Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

October Term, 1975

No. 75-5501

Travis L. B. Wilson ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

The Petitioner, Travis L. B. Wilson, respectfully prays that a Writ of Certiorari issue to review the Judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on May 12, 1975.

OPINION BELOW

The opinion of the Supreme Court of Arkansas, reported at 522 S.W.2d 413, appears in the appendix hereto.

JURISDICTION

The Judgment of the Supreme Court of Arkansas was entered May 12, 1975. This Petition is timely filed pursuant to an Order of this Court extending the time for filing to October 9, 1975. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether the purported confession given by Defendant to police in Amarillo, Texas, met the test of voluntariness, taking into consideration the "totality of the circumstances", including Defendant's physical and mental state.

2. Whether the trial Court failed to timely convene a "Denno" hearing to determine the admissibility of a purported confession.

3. Whether a purported confession to a cell mate must be found to be voluntary and admissible in a "Denno" hearing prior to its being introduced into evidence before the Jury.

4. Whether the State's reference in rebuttal closing argument to Petitioner's attorney as "appointed" is prejudicial and denial of due process of law.

STATEMENT OF THE CASE

On the afternoon of July 4, 1974, Petitioner, Travis Wilson, and one David Smith had been playing pool and drinking beer when they decided to go to the mobile home in which David Smith and Jewell McKown lived together, to see if Miss McKown could arrange a date for Wilson for that night. After purchasing a case of beer, Smith and the Petitioner arrived at the mobile home just outside Sheridan, Arkansas, in the early evening, and after a few minutes, Miss McKown thought of an individual, Melba Stone, who she thought would go out with the Petitioner. The three of them proceeded to Protho Junction near North Little Rock, Arkansas, to pick up Miss Stone, and the four of them returned to the mobile home. They were there for only a short time, when Smith and Miss McKown engaged in a lover's quarrel of disputed ferocity. The Petitioner made a sexual overture to Miss Stone, and she asked to be taken home. This was done by Smith, Miss McKown remaining there with Petitioner Wilson.

After Smith and Miss Stone had left, the State contends, Wilson and Miss McKown had sexual intercourse. When Smith returned, Miss McKown was not there. Smith went to bed, and the Petitioner in Smith's car, left the mobile home, headed for his own home in Redfield. He was extremely intoxicated when he arrived and confided in his parents that he was in "some trouble" and wanted to go to California. His parents took him to the bus station in Little Rock, and he boarded the bus in the early morning hours of July 5, 1974.

On the morning of July 5, 1974, the body of Jewell McKown was discovered near the mobile home by a fence. There were multiple puncture wounds in the chest, and

the throat had been slashed. The Petitioner was taken into custody in the early evening of July 5 in Amarillo, Texas, enroute to California. He waived extradition and was returned to Grant County, Arkansas and charged with murder in the first degree.

At the trial, a purported confession was introduced by the State given by the Petitioner while in police custody in Amarillo. The purported confession stated that he choked Miss McKown, stabbed her repeatedly with a large barbeque fork, dragging her outside to the point in the surrounding area where she was ultimately found the next morning, went back into the mobile home, got a butcher knife, returned to Miss McKown, and cut her throat. The defense contended that for a variety of reasons, the confession was inadmissible, but its Motion to suppress was denied. Also, a second purported confession was given to a cell mate, and over the objections of the defense, this second confession was admitted in evidence, and Petitioner's Motion for a mistrial was denied.

The Jury found the Petitioner guilty of murder in the first degree, and he was sentenced to life imprisonment. The trial Court denied Petitioner's Motion for a new trial, after which, the Petitioner appealed. The Arkansas Supreme Court affirmed, *Wilson v. State of Arkansas*, 522 S.W.2d 413 (1975).

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE PURPORTED CONFESSION GIVEN BY DEFENDANT TO POLICE IN AMARILLO, TEXAS, MET THE TEST OF VOLUNTARINESS,

TAKING INTO CONSIDERATION THE "TOTALITY OF THE CIRCUMSTANCES", INCLUDING DEFENDANT'S PHYSICAL AND MENTAL STATE.

The confession was allegedly given to police in Amarillo, Texas, and was involuntarily given due to Petitioner's mental and physical condition. Whether the confession was a product of Petitioner's free will is a question to be resolved independently by an Appellate Court by examining the entire record to consider the "totality of the circumstances." *Frazier v. Cupp*, 394 U.S. 731.

The Petitioner had consumed a large quantity of alcohol during the night and early morning hours of July 4-5, 1974 (R. 254). Additionally, he had consumed narcotics (R. 254), and during his bus ride to Amarillo, he consumed an additional quantity of alcohol (R. 250-60). It is clear from the record that he slept for approximately 30 minutes to an hour while being taken to the bus station in Little Rock by his parents (R. 183), and also, for a brief time at the McKown mobile home (R. 261), but otherwise, did not sleep from the morning of July 4 until the early morning hours of July 6 (R. 259 and 261).

There can be no dispute as to his lack of food during interrogation. He had last eaten lunch ("dinner") with his parents on July 4 (R. 261). When questioned, he was still suffering from the adverse effects of liquor and drugs (R. 261-2). None of the above factors were ascertained by police prior to questioning (R. 262).

But the telling proof of involuntariness is an examination of Petitioner's general intellectual condition. Petitioner testified in chambers that he was not too well

educated—that he went to the 10th grade, and had always been in special education classes (R. 262). Further, no effort (that Petitioner observed) was ever made to ascertain his general level of intelligence (R. 262). Frankly, the Petitioner is hardly literate, as Defendant's Exhibit 1, rather conclusively proves. (R. 265)

Admittedly, no one factor stated above is sufficient, but taken together can only show a picture of an accused whose will was diminished. Therefore, whether it be the effects of intoxication, or the influence of drugs or narcotics, *Beecher v. Alabama*, 389 U.S. 35, *Jackson v. Denno*, 387 U.S. 368 (1964); or the lack of sleep, *Greenwald v. Wisconsin*, 390 U.S. 519; or a low level of intelligence, *Davis v. North Carolina*, 384 U.S. 737; each of these factors when viewed in the totality of the circumstances, and properly considered, give an unmistakeable picture of an atmosphere not conducive to voluntariness.

Added to the above factors should be the fact of lengthy interrogation beginning at approximately 7:00 p.m. and going into the early hours of July 6. In this regard, testimony of police personnel should be closely scrutinized. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

For these reasons, Petitioner submits that the purported confession was involuntarily given.

II.

WHETHER THE TRIAL COURT FAILED TO TIMELY CONVENE A "DENNO" HEARING TO DETERMINE THE ADMISSIBILITY OF A PURPORTED CONFESSION.

This Court is called upon to clarify *Jackson v. Denno*, 378 U.S. 368 (1964) with regard to when the so-called "Denno" hearing must be held.

In this case, the Arkansas Supreme Court held proper the procedure wherein the State was allowed to put on its entire case, except for the confession, the ask for a "Denno" hearing to get a ruling on the purported confession. The effect is to gag the Defendant up to that point in the proceedings. The Defendant should have the right to take steps to mitigate his own words from the beginning of the trial, and failure to allow him to do so is a violation of due process.

As stated in *Jackson v. Denno*, supra:

> "Equally clear is the Defendant's constitutional right at some *stage in the proceedings* to object to the use of the confession and to have a fair hearing and a reliable determination of the issue of voluntariness, a determination uninfluenced by the truth of falsity of the confession. *Rogers v. Richmond*, [365 U.S. 534]." 378 U.S. at 376-7. (Emphasis ours)

III.

WHETHER A PURPORTED CONFESSION TO A CELL MATE MUST BE FOUND TO BE VOLUNTARY AND ADMISSIBLE IN A "DENNO" HEARING PRIOR TO ITS BEING INTRODUCED IN EVIDENCE BEFORE THE JURY.

Petitioner knows of no reason why the principles of *Jackson v. Denno, supra* should not be applied to the situation where the confession is to a cell mate rather than

to police officials. All that would be required would be a finding that the statement made in custody was voluntary. The fact that Petitioner was in custody at the time of the alleged statement should be the only controlling fact. A hearing called for the purpose of determining voluntariness should make findings as to whether the Defendant was suffering from a lack of sleep, a lack of food, from drugs, or alcohol, or any other influencing factor which would cause him to make a statement which he would not normally make were he not in custody and were he not influenced by such factors. Failure to hold such a hearing, Petitioner asserts, is a denial of due process of law.

A practical consideration in the present case is the effect which this evidence had on the Jury. As previously indicated, the Jury already had one confession before it, and the police officers who took the confession were vigorously cross-examined. With the introduction of this second confession, the Jury might have returned its verdict on the weight of this second confession only, having been influenced by the cross-examination of the police officer. Therefore, it can hardly be said, as the Arkansas Supreme Court held, that the admission of the testimony "constituted harmless error beyond a reasonable doubt." 522 S.W.2d at 416.

Milton v. Wainwright, 407 U.S. 371 (1972), cited by the Arkansas Supreme Court to support its harmless error doctrine, can, of course, be distinguished as the present Petitioner has not raised, even by innuendo, an entrapment theory. Petitioner does not assert that *Miranda* warnings should be given, and such would be an impossibility. Petitioner simply asserts that a basic finding of voluntariness should be made by the trial Judge prior to admission of the confession in evidence.

IV.

WHETHER THE STATE'S REFERENCE IN REBUTTAL CLOSING ARGUMENT TO PETITIONER'S ATTORNEY AS "APPOINTED" IS PREJUDICIAL AND A DENIAL OF DUE PROCESS OF LAW.

It should be noted that the Arkansas Supreme Court found the practice of referring to a defense attorney as "appointed", while not prejudicial in itself, to be not favored. Petitioner asserts that it is a denial of due process of law and equal protection of the laws for the reason that it creates a dual standard of justice—one for Defendants wealthy enough to retain counsel, and the other for Defendants who are to rely on appointed counsel. This is not to imply or suggest that an appointed defense attorney would, or could, do a better or poorer job. However, the inference is clear in the Jury's mind: that guilty Defendants must rely on appointed attorneys while innocent Defendants are able to hire an attorney. Sheridan, the town in which this case was tried, is a small community, having only a few lawyers. Jurors could well infer that because this Defendant had an appointed attorney, no one in the small town of Sheridan was willing to take his case because of the fact of his guilt. That this dilutes the basic constitutional principles enunciated in *Gideon v. Wainwright*, 372 U.S. 335 (1963) and prodigy, cannot be denied.

CONCLUSION

For the reasons stated, Petitioner asserts that the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF ARKANSAS

TRAVIS L. B. WILSON Appellant V. STATE OF ARKANSAS Appellee	Appeal from Grant County Circuit Court, Henry B. Means, Judge AFFIRMED

This is an appeal from a conviction of first degree murder in which appellant received a life sentence. Appellant, Travis L. B. Wilson, lists six points of asserted error in the trial of his case. After a brief statement of background facts, we shall list those six points and discuss them separately. The evidence will be treated more particularly under the points for reversal. Suffice it to say that the body of Jewel McKown was found in close proximity to a trailer court where she lived, apparently slashed to death. Her body was discovered on the morning of July 5, 1974, near the mobile home which she rented, and which had been the scene of a gathering of two couples including Jewel and appellant, beginning late in the afternoon of July 4. Some intoxicants were consumed. It is apparent that around midnight one of the couples left while Miss McKown and Wilson remained inside the trailer. Appellant is said to have gone to the home of his parents in Redfield during the early morning hours and confided to his parents that he was in trouble and wanted to go to California. The parents took him to the bus station in Little Rock. The local officers called ahead and appellant was found at the bus station in Amarillo, Texas. He

waived extradition and was returned to Grant County and charged with murder in the first degree.

Point I. *The trial court erred in refusing to comply with the McNabb-Mallory rule.* We are again urged to adopt the McNabb-Mallory rule as it exists in federal practice, holding that failure to promptly arraign an accused will render a confession made by him during a confinement inadmissible. We decline to adopt the rule and recently so held in *Mitchell v. Bishop*, 248 Ark. 427, 452 S.W.2d 340 (1970), holding Ark. Stat. Ann. §43-601 (Repl. 1964) to be directory only.

Point II. *The purported confession does not meet the test of voluntariness.* Appellant insisted that he was under the influence of intoxicants to a heavy degree on the night in question. When appellant was apprehended in Amarillo, the arresting officer testified that he went over the Miranda warnings with appellant, explaining them in considerably more detail than the form language, and that appellant signed the waiver. Three statements were given to the officer - first, without recordation, just oral; second, oral only again because the tape recording machine was not properly operated; and, third, on a tape recorder and transcribed. The appellant signed the transcribed statement. Appellant said he understood the Miranda rights save an idea of his own about the time for appointment for an attorney. The appellant testified to the voluntariness and to the cooperativeness of the arresting officer. Appellant's main attack on the statement is his alleged intoxication, lack of sleep and food, and because of his lack of intelligence. We point out that the issue of intoxication was presented by conflicting testimony. David Smith and Melba Stone testified that in their opinion he was not drunk on the night of the alleged

offense. The appellant's brother testified that when the appellant sobered up, he remembered the events that transpired while he was drunk.

Appellant also makes much of a lack of intellectual capacity chiefly through the introduction of letters written while in the State Hospital. The appellant, however, had a tenth grade education, and his writing and spelling prowess do not comport with his insistence on being intellectually backward.

Appellant also alludes to the nature of the custodial investigation as extremely lengthy, however, the interrogating officer testified that the total time of the interrogation was a maximum of one and one-half hours and that it was of such length only because the tape recorder was not in operating condition the second time the statement was taken. Also, appellant testified to the cooperative nature of the interrogating officer. In short, the trial court's finding of voluntariness was proper when viewed in the total circumstances and the confession was therefore properly admitted in evidence.

POINT III. *The verdict is not supported by substantial evidence as regards the elements of murder in the first degree.* The elements of malice and premeditation are very much in evidence and are certainly sufficient to support the verdict. Malice can be implied from the circumstances of the killing. Malice is certainly in evidence in this case by the use of a barbecue fork or other similar object used to stab the deceased repeatedly in the chest and neck areas, even to the point of puncturing the heart eight or nine times, and by the use of a butcher knife to slash the throat of the deceased. The nature of the wounds and the weapons used are certainly sufficient to show the

manifestation of "an abandoned and wicked disposition" on the part of the assailant, and concurrently is evidence of a "deliberate intention of mind unlawfully to take away the life of a human being". Ark. Stat. Ann. §41-2203, 2204 (Repl. 1964). Appellant states that the requisite element of first degree murder, premeditation, cannot be presumed but must be proven beyond a reasonable doubt. Of course we have many times held that the element of premeditation can be inferred from the circumstances of the case. *Kagebein v. State*, 254 Ark. 904. 496 S.W.2d 435 (1973). The circumstances of this case are certainly ample for such an inference to have been drawn by the jury. The appellant's confession admitted a noticeable gap between an act of intercourse between him and the victim, and his choking the girl. There was the binding of the deceased's hands and the gagging with a towel around the head, the dragging of the body to the fence line, the cleaning up of the porch, presumably with a wet mop with blood stains thereon. There was also evidence that there may have been a struggle as evidenced by scratches on appellant's chest and stomach.

Under this point appellant challenges the proof of the corpus delicti on the part of the state's evidence. The point is hardly worth comment because the evidence of the corpus delicti is overwhelming from all the proof in the case. *Hays v. State*, 230 Ark. 731, 324 S.W.2d 520 (1959).

Point IV. *The trial court failed to timely convene a pretrial evidentiary hearing to determine the admissibility of a purported confession made by the appellant.* To support this point appellant says: "The record shows that more than three weeks prior to trial, appellant filed a written motion praying that the court convene a pre-trial *Denno* hearing to determine the admissibility of certain

incriminating statements that were allegedly made by appellant, and specifically whether any confession was voluntarily made by him". We are cited no authority for the asserted requirement that the *Denno* hearing must be convened well in advance of the date set for trial. In *Sheppard v. State*, 239 Ark. 785, 394 S.W.2d 624 (1965) we apparently approved the procedure of the court calling a *Denno* hearing in chambers when the purported confession is presented for admission. Then *Hall v. State*, 242 Ark. 201, 412 S.W.2d 603 (1967) it is perfectly clear that the *Denno* hearing was convened after the trial was under way but before the confession was placed in evidence.

Point V. *The trial court should have granted a mistrial when the State produced the testimony of a cellmate to the effect that appellant confessed the crime without first ordering a Denno hearing.* After careful consideration we are of the conclusion that the admission of the testimony constituted harmless error beyond a reasonable doubt. The United States Supreme Court reached the same conclusion in *Milton v. Wainwright*, 407 U.S. 371 (1972). In *Milton* the prosecution clothed a detective as a prisoner and placed him in the cell with Milton. The accused made severe incriminating statements amounting to a confession. The trial court admitted the testimony of the detective. The Court said in *Milton:*

> On the basis of the argument in the case and our examination of the extensive record of petitioner's 1958 trial, we have concluded that the judgment under review must be affirmed without reaching the merits of petitioner's present claim. Assuming, *arguendo*, that the challenged testimony should have been excluded, the record clearly reveals that any error in its admission was harmless

> beyond a reasonable doubt. *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967). The jury, in addition to hearing the challenged testimony, was presented with overwhelming evidence of petitioner's guilt, including no less than three full confessions that were made by petitioner prior to his indictment. Those confessions have been found admissible in the course of previous post-conviction proceedings brought by petitioner in his attempts to have this conviction set aside, and they are not challenged here.

In the case at bar a confession which was found to be voluntary was before the jury. The physical facts which were entirely undisputed, corroborated many important facts revealed by the confession. They revealed overwhelming evidence of appellant's guilt. The prisoner who was produced as a witness was cross-examined in great detail and there was no intimation that appellant was trapped or coerced in any manner.

Point VI. *The court should have granted a mistrial because in his closing argument the State's attorney referred to appellant's attorney as "appointed counsel".* While we do not find the statement in itself to be prejudicial we think the better practice would be to abstain from such designation.

Affirmed.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE PURPORTED CONFESSION GIVEN BY DEFENDANT TO POLICE IN AMARILLO, TEXAS, MET THE TEST OF VOLUNTARINESS, TAKING INTO CONSIDERATION THE "TOTALITY OF THE CIRCUMSTANCES," INCLUDING DEFENDANT'S PHYSICAL AND MENTAL STATE.

2. WHETHER THE TRIAL COURT FAILED TO TIMELY CONVENE A "DENNO" HEARING TO DETERMINE THE ADMISSIBILITY OF A PURPORTED CONFESSION.

3. WHETHER A PURPORTED CONFESSION TO A CELL MATE MUST BE FOUND TO BE VOLUNTARY AND ADMISSIBLE IN A "DENNO" HEARING PRIOR TO ITS BEING INTRODUCED INTO EVIDENCE BEFORE THE JURY.

4. WHETHER THE STATE'S REFERENCE IN REBUTTAL CLOSING ARGUMENT TO PETITIONER'S ATTORNEY AS "APPOINTED" IS PREJUDICIAL AND DENIAL OF DUE PROCESS OF LAW.

ARGUMENT

The issues in this case have been narrowly drawn and the judicial review has been sufficient to not warrant review by this Court on certiorari. The *Denno* hearing held pursuant to the Arkansas statutory scheme properly heard all of the evidence and testimony constituting the "totality of circumstances" and the finding of admissibility was affirmed on appeal. The issues of the time at which the *Denno* hearing must be held, before or during trial, and the necessity of a *Denno* hearing in the case of an inculpatory statement made to a person without law enforcement authority and not in an informant relationship therewith were also presented and determined adversely to the petitioner upon the basis or prior holdings by the Arkansas Supreme Court and this Court. The case at bar does not raise special or important issues that require review by this Court and petitioner's petition for a writ of certiorari should not be entertained.

I

WHETHER THE PURPORTED CONFESSION GIVEN BY DEFENDANT TO POLICE IN AMARILLO, TEXAS MET THE TEST OF VOLUNTARINESS, TAKING INTO CONSIDERATION THE "TOTALITY OF THE CIRCUMSTANCES," INCLUDING DEFENDANT'S PHYSICAL AND MENTAL STATE.

The petitioner's confession was found to have been freely and voluntarily given by the trial court pursuant to a *Denno* hearing and written findings therefrom which decision predicating admissibility was reviewed and affirmed by the

Arkansas Supreme Court. The findings of both forums were made on the basis of the totality of the circumstances. ***Boulden*** v. ***Holman,*** 394 U.S. 478, 89 S. Ct. 1138, 22 L. Ed. 2d 433 (1969); ***Harris*** v. ***State,*** 244 Ark. 314, 425 S.W. 2d 293 (1968). The hearing upon the voluntariness of the confession was held in accord with ***Jackson*** v. ***Denno,*** 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), and as required by statute, Ark. Stat. Ann. §43-2105 (Supp. 1973).

Petitioner, however, would have this Court review again those determinations alleging they were erroneously rendered with respect to the evidence of defendant's intoxication, lack of sleep, lack of food, and general intellectual condition. The argument, too, alleges that the length of the interrogation resulting in the confession is another factor denying the propriety of admissibility.

Petitioner's claim of involuntariness because of his intoxication induced either by alcohol or drugs was presented to the trial court by controverted evidence. The other participants in the activities immediately preceding the homicide and subsequent flight of the defendant testified that defendant was not drunk that night. Their testimony was controverted only by the defendant's parents, obviously interested parties. Defendant also alleged the consumption of some alcohol which he found in a bus station restroom enroute to Amarillo, Texas. There was no proof adduced to this latter point save defendant's claim.

Considering the testimony in the light most favorable to the defendant the evidence reveals that the defendant arrived at his parent's home at 2:00 to 2:15 A.M. on July 5th, left on the bus out of town at 5:15 A.M. on July 5th, was arrested in Amarillo, Texas at 8:00 A.M. on July 5th, the Arkansas investigating officers arrived in Amarillo at midnight on July 5th, the waiver of rights form was signed and the questioning of the defendant began at 1:20 A.M. on July 6th. Therefore, save whatever alcohol was allegedly consumed enroute to Amarillo the evidence showed that the defendant had not ingested any intoxicants for the twenty three preceding hours.

The generally accepted proposition concerning the defense of intoxication at a voluntariness hearing is ". . . that intoxication at the time of making a confession will not exclude such from being admitted into evidence; however, such intoxication will go to the weight and credibility of the confession. . . ." ***Fant*** v. ***Peyton,*** 303 F. Supp. 457, 459 (D.C. W.D. Va., 1969). Accord, see, ***United States*** v. ***Harden,*** 480 F. 2d 649 (8th Cir. 1973). Under this standard the confession was properly admitted in evidence by the trial judge.

The defendant's alleged drug induced intoxication, from ". . . a quart of THC . . .," too, was allegedly ingested over twenty four hours before the confession, and was directly controverted by a witness who was present when it was alleged to have been taken. The witness said she saw no evidence of drugs and none were found at the residence of the deceased the following morning by the police. Inferentially, the same standard is applied to allegations of drug induced intoxication as to alcohol induced, as the standard is whether the drug deprived the defendant of "a rational intellect and free will." ***Harden,*** supra, at 650; ***Townsend*** v. ***Sain,*** 373 U.S. 293, 307 (1963).

The alleged lack of food and sleep as elements operating to vitiate the knowing and voluntary character of the confessions given by the defendant were controverted by the spontaneousness and clarity of his answers, and by his ability to recount the same confession almost verbatim three times.

This latter element also carries considerable weight as to the issue of the defendant's alleged diminished intellectual capacity. The appellant did have a tenth grade education and his demonstrated ability to orally express himself and to reconstruct events, which must be considered excellent, operate to nullify his claim based solely upon the evidence of his writing and spelling prowess.

The issue raised by defendant as to the alleged lengthy interrogation was also controverted. The interrogation did not begin at 7:00 P.M. as alleged by the defendant because the interrogating officers did not arrive in Amarillo until midnight and the interrogating officer testified that the total time spent with the defendant was only one and a half hours. He also testified that it took that period of time only because the tape recorder malfunctioned when the defendant repeated his statement the second time.

Other factors that must be considered in the totality of review are that the interrogation did not take place in a police dominated atmosphere as there were no uniformed personnel present, that the Arkansas officers shared their dinner with appellant after the interrogation, and the defendant's own testimony about the cooperative and congenial nature of the interrogating officer.

When the totality of the circumstances is shown, especially as to each of the alleged deficiencies the decision of both the trial court and the Arkansas Supreme Court finding the confession to have been given voluntarily and knowingly were proper and do not warrant review by this Court.

II

WHETHER THE TRIAL COURT FAILED TO TIMELY CONVENE A "DENNO" HEARING TO DETERMINE THE AADMISSIBILITY OF A PURPORTED CONFESSION.

The procedure adopted both in *Jackson* v. *Denno*, 378 U.S. 368 (1964) and by statute in Arkansas, Ark. Stat. Ann. §43-2105 (Supp. 1973) operate in a manner protective of the rights of the defendant and achieve the proper purpose, i.e. making a determination by the trial judge of the voluntary and knowing character of a custodial confession before the presence of same is known to the jury. The procedure is totally compatible with the directive of *Jackson*, supra:

> "It is both practical and desirable that in cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence." U.S. at 395.

Respondent has found no cases nor has petitioner referred to any which hold that the *Denno* hearing must be held before the trial commences. In this case, the jury had no inkling that the defendant had confessed to the law enforcement officer until after the trial court had held a hearing in chambers and had held the confession admissible as voluntary. This it seems to respondent is the intent of the Court's decisions and it has been sanctioned as proper by the Arkansas Supreme Court. *Hall* v. *State*, 252 Ark. 201, 412 S.W. 2d 603 (1973); *Sheppard* v. *State*, 239 Ark. 785, 394 S.W. 2d 624 (1965). Further, the procedure utilized provides the most efficient and economical means of expediting the disposition of the issue of the volun-

tariness of the confession; all necessary witnesses, whether from in or out of the State, are present at the trial itself; the State and defendant need to incur the expense of producing witnesses only once; the entire chronology of events is more easily demonstrated and understandable; and, the procedure works in favor of the defendant. As regards the latter elements, the procedure utilized prevents the State from any mention of the defendant's inculpatory statement in opening argument or at any time before its admission in evidence which enhances the defendant's presumption of innocence and prevents the State from making repetitive references to same which may adversely affect the jury's reception of other evidence. In short, the procedure complies with the intent of *Denno,* supra, and there is no resulting prejudice to the defendant.

III

WHETHER A PURPORTED CONFESSION TO A CELLMATE MUST BE FOUND TO BE VOLUNTARY AND ADMISSIBLE IN A "DENNO" HEARING PRIOR TO ITS BEING INTRODUCED IN EVIDENCE BEFORE THE JURY.

The statement of the defendant to a jail mate was not made in a situation demanding a hearing on the voluntariness thereof prior to its admission at trial in the form of testimony.

Jackson v. *Denno,* supra, and its progeny demand a careful scrutiny of custodial interrogations conducted by law enforcement officials and of the methods employed. However, those cases do not require nor should they require the same scrutiny in instances where the defendant makes incriminating statements to private parties without the status of or a

relationship with a law enforcement official.

In this case the defendant reiterated his thrice given confession to a sixteen year old jail mate who was incarcerated before defendant's arrival on charges of public drunkenness and resisting arrest. The testimony showed that the jail mate, Bennie Vance, was not working for the police and that no subterfuge or deception was used by him. There was no interrogation, rather the appellant volunteered the statement. There was no coercion, nor promises of leniency which would vitiate the voluntariness of the statement and the cross-examination of the witness clearly bore this out.

This Court, in outlining the method to be used in determining the voluntariness of a confession and in stating the reasons for such a hearing, stated:

"It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the 'strongly felt attitude of our society that important human values are sacrificed where ***an agency of the government,*** in the course of securing a conviction, wrings a confession out of an accused against his will,' ***Blackburn*** v. ***Alabama,*** 361 U.S. 199, 206-207, 4 L. Ed. 2d 242, 248, 80 S. Ct. 274, and because of 'the deep-rooted feeling that ***the police*** must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.' ***Spano*** v. ***New York,*** 360 U.S. 315, 320-321, 3 L. Ed. 2d 1265, 1270, 79 S. Ct. 1202." ***Jackson,*** supra, U.S. at 385-. (Our emphasis added.)

In the same case, the Court said:

> "As reflected in the cases in this Court, *police conduct* requiring exclusion of a confession has evolved from acts of clear physical brutality to more refined and subtle methods of overcoming a defendant's will." *Jackson,* supra, U.S. at 389. (Our emphasis added.)

In this case, "police conduct" or acts by an "agency of the government" are not in issue, and, therefore, a *Denno* hearing is not required. The intent of *Jackson,* supra, is further articulated in *Lego* v. *Twomey,* 404 U.S. 477 (1972) where this Court stated:

> "In 1964, this Court held that a criminal defendant who challenges the voluntariness of a confession *made to officials* and sought to be used against him at this trial has a due process right to a reliable determination that the confession was in fact voluntarily given and not the outcome of coercion which the constitution forbids." U.S. at 478.

Therefore, neither *Jackson,* supra, nor its progeny require that a hearing be held on the voluntariness of a confession made in the circumstances of this case. There is no allegation of police misconduct or even of involvement by law enforcement officials and the mere fact that the defendant was in jail at the time does not provide sufficient compelling reason for such confessions to be so scrutinized.

However, another important feature of this particulr case is that the confession admitted in evidence through the testimony of the defendant's jail mate was nearly verbatim the same con-

fession made by the defendant to the officers in Amarillo, Texas, which had already been admitted in evidence. The confession in Amarillo, Texas, was given three times to the officers. Further, the physical and testimonial evidence at trial corroborated nearly every fact present in the defendant's many confessions. In short, the evidence of the guilt of the defendant was overwhelming. In such circumstances, this Court has sanctioned a finding of harmless error as to evidence improperly introduced. *Harrington* v. *California,* 395 U.S. 250 (1969); *Chapman* v. *California,* 386 U.S. 18 (1967). A factually analogous case to the present, too, endorses this approach. *Milton* v. *Wainwright,* 407 U.S. 371 (1972). Respondent submits that the testimony of the jail mate was properly elicited at trial without the necessity of subjecting it to the scrutiny of a *Denno* hearing because there was no element of law enforcement official involvement, but, if that procedure is erroneous that it was harmless error. This is not a proper case for this Court's review.

IV

WHETHER THE STATE'S REFERENCE IN REBUTTAL CLOSING ARGUMENT TO PETITIONER'S ATTORNEY AS "APPOINTED" IS PREJUDICIAL AND A DENIAL OF DUE PROCESS OF LAW.

In Arkansas, the granting of a mistrial is an extraordinary remedy that should not be resorted to except in cases where the interests of justice cannot otherwise be met. This is not a situation demanding that remedy. When the comment is seen in its context it is most innocuous and the defendant's umbrage is not justified. The entire statement is as follows, without petitioner's intervention:

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"Ladies and Gentlemen of the jury, when the Court appointed Mr. Ellis to represent this man, he was given a most difficult task."

Respondent fails to see how such a statement reflects upon counsel's competence or upon any alleged difference between appointed and retained counsel that would adversely affect the jury. Respondent fails, also, to see how the statement denies the rights of equal protection or due process to petitioner or how it dilutes *Gideon* v. *Wainwright,* 372 U.S. 335 (1965) and its progeny. The statement would have been equally true had the reference been to retained counsel in the face of the overwhelming evidence against the petitioner. The comment in this case was determined to have been not favored, but neither was it prejudicial. The reasoning of the Arkansas Supreme Court is proper and that reasoning is closely aligned to the decision of this Court in *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811, reh. den. 310 U.S. 658, 84 L. Ed. 1421, 60 S. Ct. 1091 (1940), and the factors which precipitated that decision apply in full force to this case. The prosecutor in *Socony-Vacuum,* supra, made repeated references to the wealth of the defendants as a factor to be considered by the jury in determining guilt or innocence much as petitioner claims the prosecutor did herein. This Court there said that although the statements exceeded the bounds of propriety, they did not require a reversal because (1) the record did not show that the jurors' minds would be influenced by such incidental remarks to the extent that they could not evaluate the evidence objectively, (2) the government's case was not weak, and (3) the statements were minor aberrations in a long trial and were not so continual as to create a forum dominated by prejudice and passion. This isolated comment when viewed in its context and when judged by the standards of this Court can-

not be found to have arisen to prejudice, and this Court should refuse to review this issue on the grounds claimed by petitioner.

CONCLUSION

Respondent submits that upon the foregoing arguments this Court should refuse to grant the petitioner's Writ of Certiorari.

Respectfully submitted,

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